

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE VALVE ANTITRUST LITIGATION

Case No. 2:21-cv-00563-JCC

**PLAINTIFFS' LOCAL CIVIL RULE
7(g)(2) SURREPLY MOTION TO
STRIKE**

NOTE ON MOTION CALENDAR:
August 12, 2024

1 Plaintiffs respectfully move to strike limited aspects of Valve’s Reply Brief in Support of
 2 Its Motion to Exclude Testimony of Steven Schwartz, Ph.D. (“*Daubert* Reply”) (Dkt. 337) and the
 3 entirety of the supporting Reply Expert Report of Ashley Langer, Ph.D. (“Langer Reply”) (Dkt. 338-1).¹

4 **I. BACKGROUND**

6 On January 16, 2024, the Court ordered the parties’ Stipulated Motion to Modify Case
 7 Schedule, which provides the following deadlines: (1) February 8, 2024 for Plaintiffs to file their
 8 opening class certification motion and serve opening expert reports in support of class
 9 certification, (2) May 17, 2024 for Valve to oppose class certification, file *Daubert* motions, and
 10 serve their rebuttal expert reports, (3) July 12, 2024, for Plaintiffs to file their reply class
 11 certification brief, file *Daubert* motions and oppositions, and serve reply expert reports in further
 12 support of class certification, and (4) August 12, 2024 for Valve to file their *Daubert* Reply brief.
 13 Dkt. 176. Notably, the schedule does *not* allow Valve to serve expert reply or surreply reports.
 14 The schedule instead closed expert discovery on July 26, 2024, roughly three weeks before
 15 Valve’s *Daubert* Reply was due. *Id.*

16 Nevertheless, on August 12, 2024, Valve served the “reply report” of Dr. Langer, as an
 17 exhibit to its *Daubert* Reply brief. *See* Dkts. 337, 338-1.

18 **II. THE COURT SHOULD STRIKE VALVE’S NEW REPLY ARGUMENTS** 19 **WHICH ARE PREMISED ON AN UNTIMELY EXPERT REPORT**

20 A moving party cannot “introduce new facts or different legal arguments in the reply brief
 21 than those presented in moving papers.” *Cnty. Ass’n for Restoration of Env’t Inc. v. Wash. Dairy*
 22 *Holdings LLC*, 2019 WL 13117758, at *8 (E.D. Wash. Oct. 24, 2019); *Wild Fish Conservancy v.*
 23 *U.S. Envt’l Prot. Agency*, 331 F. Supp. 3d 1210, 1219 n.3 (W.D. Wash. 2018). Because such
 24 arguments deprive the opposing party of the ability to respond, courts routinely strike them. *See,*
 25 *e.g., Bach v. Forever Living Prods. U.S., Inc.*, 473 F. Supp. 2d 1110, 1122 n.6 (W.D. Wash. 2007)

26 _____
 27 ¹ Though styled as a “reply” report, in fact, Langer’s “Reply” is a surreply expert report, responding to the reply expert report of Plaintiffs’ economist Dr. Schwartz.

(striking new arguments raised for the first time on reply); *Alaska Local 375 Plumbers & Pipefitters Trust Funds v. Wolf Creek Fed. Servs., Inc.*, 2023 WL 2138302, at *3 (W.D. Wash. Feb. 21, 2023) (striking new argument raised in reply brief); *see also Bridgham-Morrison v. Nat'l Gen. Assembly Co.*, 2015 WL 12712762, at *2 (W.D. Wash. Nov. 16, 2015) (“new arguments and evidence presented for the first time on Reply...are generally waived or ignored.”).

Further, Federal Rule of Civil Procedure 26(a)(2)(D) “requires a party to disclose the identity of a witness it intends to call as an expert and, in the case of a witness who is retained or specifically employed to provide expert testimony in the case, ‘at the time and in the sequence that the court orders.’” *Rekor Sys., Inc. v. Loughlin*, 2022 WL 2063857, at *5 (S.D.N.Y. June 8, 2022) (quoting Fed. R. Civ. P. 26(a)(2)(D)). “Rule 37(c)(1) gives teeth to these requirements by forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed.” *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). Courts will exclude expert opinions that are not timely disclosed under the case schedule set by the court. *See, e.g., Miller v. United States*, 2019 WL 4511807 (W.D. Wash. Sept. 19, 2019) (excluding opinions not disclosed until after the expert discover cutoff), *order clarified*, 2019 WL 6683519 (W.D. Wash. Dec. 6, 2019); *Bell v. Boeing Co.*, 2022 WL 1206728, at *6 (W.D. Wash. Apr. 22, 2022) (“Bell’s failure to meet the expert report deadline in this case is simply unacceptable.”).

Here, Valve violates both of these basic notions of fairness. The first section of Valve’s reply brief—relating to Steam Keys—offers new arguments concerning Plaintiff Wolfire’s use of Steam keys. Dkt. 337 at 3:1-4:2. Valve similarly offers new arguments concerning Steam Community Market transactions, *id.* at 5:13-6:3, suggesting these transactions are relevant to a two-sided platform analysis, despite not being included in Plaintiffs’ damages model at all.

Further, Valve relies upon new expert testimony which was not timely disclosed within the case schedule, including new data analyses regarding Wolfire’s use of Steam Keys, Langer Reply ¶¶ 3-4, and new economic opinion concerning Valve’s Steam Community Market and the

1 appropriateness of considering such Market transactions in analyzing Valve's platform, *id.* ¶¶ 7,
2 17.

3 By raising these arguments and proffering untimely expert testimony for the first time on
4 reply, Valve has improperly deprived Plaintiffs of the ability to respond. Accordingly, Plaintiffs
5 respectfully request that the new argument contained in Valve's Reply at 3:1-4:2 and 5:13-6:3 be
6 stricken, and that the untimely Langer Reply Report be stricken in full. Valve's new arguments
7 could and should have been made in its opposition brief and rebuttal expert reports. *See Wash.*
8 *Cities Ins. Auth. v. Ironshore Indemn., Inc.*, 443 F. Supp. 3d 1218, 1220 n.1 (W.D. Wash. 2020)
9 (granting a motion to strike exhibits attached to a reply brief where the evidence was available, but
10 not filed, earlier); *see also Kimsey v. City of Sammamish*, 574 F. Supp. 3d 911, 922 (W.D. Wash.
11 2021) (granting a motion to strike declarations filed with a reply where the declarations attested to
12 alleged facts that could have been identified with the initial motion).

13 In the event the Court is inclined to consider any of Valve's untimely submissions,
14 Plaintiffs request that they be given four pages to respond in a brief, and that Plaintiffs be granted
15 permission to file a short surreply expert report. *Fleming v. Parnell*, 2013 WL 4511494, at *2
16 (W.D. Wash. Aug. 23, 2013) (granting motion for leave to file substantive surreply to address new
17 reply arguments); Minute Order, *In re Valve Antitrust Litig.*, No. 2:21-cv-00563-JCC (W.D.
18 Wash.), Oct. 5, 2021, Dkt. 64 (same).

19 CONCLUSION

20 Plaintiffs respectfully request that the new arguments contained in Valve's *Daubert* Reply
21 brief, and the entirety of the untimely Langer Reply report, be stricken. To the extent the Court is
22 inclined to consider the new material, Plaintiffs request the opportunity to briefly respond, as set
23 out above.

DATED: August 19, 2024

Respectfully submitted,

/s/ Alicia Cobb

/s/ Stephanie L. Jensen

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Executive Committee Member

LCR 7 CERTIFICATION

I certify that this memorandum contains 1,028 words, in compliance with the 1,050 word limit set forth in Local Civil Rule 7(e)(2).

DATED: August 19, 2024

/s/ Alicia Cobb

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2021, I caused a true and correct copy of the foregoing to be filed in this Court's CM/ECF system, which sent notification of such filing to counsel of record.

DATED: August 19, 2024

/s/ Alicia Cobb

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